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THE LAW OF WITNESSES AND EVIDENCE IN CANADA

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The Law of Witnesses and Evidence in Canada (formerly Witnesses) is a leading comprehensive treatment of the law of evidence as it applies to evidence given by witnesses in civil and criminal proceedings, as well as before administrative tribunals, public inquiries, and legislative committees. This is a practical reference work, providing coverage and expert analysis of evidentiary issues as they arise in these types of proceedings. Individual chapters examine testimonial evidence under subjects such as competence, compellability, compelling attendance, examination and cross-examination, and privilege.

This completely revised work also introduces 6 new chapters on a variety of topics and continues on the standards of excellence established by Witnesses, originally authored by Alan W. Mewett and Peter Sankoff.

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What’s new in this update:

The release updates the following chapters: Chapter 3 (Types of Proof), Chapter 4 (Burdens of Proof and Presumptions), Chapter 6 (Competence and Compellability), Chapter 9 (Witness Misconduct: Refusing to Give Evidence or Committing Perjury), Chapter 16 (Opinion Evidence and the Expert Witness), Chapter 17 (Privilege) and Chapter 18 (Public Interest Immunity).

Highlights: Case Law

Burdens of Proof and Presumptions — Evidential Burden — Criminal Cases — Evidential Burdens on the Prosecution — In *R. v. Pan*, the Supreme Court appeared to put some gloss on this idea, noting that “the narrow exception to the rule that the evidence must be assumed to be true is that a bare assertion, without more, may be insufficient to establish an air of reality”. This is certainly true to a certain extent. If the accused testifies that they acted in self-defence, but there is no evidence to satisfy the elements of that defence, including from the accused, the defence need not be left to the jury. But the Court also suggested that testimony could be discarded as a “bare assertion” where it “conflicts with evidence that is not materially in dispute”. This is a more problematic approach, because “a jury should be allowed — indeed, required — to consider legal theories, even if the evidence offered to support them is so preposterously weak that the result looks to be foregone”: Palma Paciocco, “Clearing the Air: *R. v. Pan* and the Air of Reality Standard” (2025) 2 C.R. (8th) 67; *R. v. Pan*, 2025 SCC 12.

Witness Misconduct: Refusing to Give Evidence or Committing Perjury — Contempt of Court — Contempt Procedures — Charter Considerations — The protection against self-incrimination set out in s. 11(c) of the Charter also prevents the accused from being forced to testify as part of a contempt citation, a point resoundingly confirmed by the Ontario Court of Appeal in *Sutherland Estate v. Murphy*. In this case, the plaintiffs alleged that the defendant ran a fraudulent cryptocurrency scheme that took a sizeable sum from them. A motion judge granted them several forms of injunctive relief, which authorized seizure of the defendant’s cell phones. When the plaintiff’s executed the order, the defendant refused to turn over his iPhone, and by the next day, had deleted the data from the device. In assessing whether contempt had occurred, the motions judge required the defendant to attend five separate examinations so that his conduct could be subject to cross-examination by the plaintiff and its expert. The motion judge then used evidence from these examinations to conclude that civil contempt had been proven beyond a reasonable doubt and sentence the plaintiff to five months’ imprisonment: *Sutherland Estate v. Murphy*, 2025 ONCA 227.

Opinion Evidence and the Expert Witness — Experts: Necessity — Particular Areas of Concern — Issues of Credibility at Trial — The admissibility of expert testimony touching on memory is a real battleground, and, as was the case with McIntosh and M.(B.), it is easy to locate decisions where such evidence has been admitted and others where it has been excluded. One of the more recent decisions on point is *R. v. P.J.C.*, yet another decision on this point from the Ontario Court of Appeal. In *P.J.C.*, the accused was charged with assaulting and sexually assaulting his stepchildren. To support its case, the

Crown tendered a witness who testified about the neurobiology of trauma and its effect on memory. The purpose was to provide a biological explanation for how people recall traumatic events, and, in particular, sexual assault. The expert provided considerable detail about how the trauma of sexual assault can be expected to impact a child's memory. In particular, she answered hypotheticals raised by the Crown that matched the complainants' testimony, suggesting that the nature of the answers provided were very consistent with how a victim of sexual abuse would answer. The trial judge relied on the evidence in convicting the accused, though only as a "minor factor". Notwithstanding this caveat, the Ontario Court of Appeal set the conviction aside and ordered a new trial: *R. v. P.J.C.*, 2025 ONCA 196.